UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Winn-Dixie Stores Inc., et al,	
	Docket #: 5:15-cv-06480-BMS
Plaintiffs,	
	United States Courthouse
vs.	Philadelphia, PA
	March 21, 2022
Eastern Mushroom Marketing	
	9:41 a.m.
Cooperative, et al,	
Defendants.	

TRANSCRIPT OF CIVIL JURY TRIAL - DAY 15
BEFORE THE HONORABLE BERLE M. SCHILLER
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

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THE COURT: Good morning.
MR. AHERN: Good morning.
MR. DESTEFANO: Good morning.
MR. BELL: Good morning.
MR. BRUNELLI: Good morning.
THE COURT: Be seated. Yes?
MR. AHERN: Your Honor, I believe at one point you entered an order saying you were going to --
THE COURT: I didn't enter an order.
MR. AHERN: Well, saying that you were enter -- you were going to seat eight with two alternates.
THE COURT: I suggested eight, and everyone said we'll do 10, and 10 is it.
MR. AHERN: Oh, okay, all right. I didn't remember that, so -- but that's fine. That's fine. I wouldn't want --
THE COURT: You may lose a couple.
MR. AHERN: Well, I mean, I wouldn't -- you know, I don't somebody who's been here for the whole time to miss out on actually the deciding part, you know.
THE COURT: This is the exciting part.
MR. AHERN: No, the deciding part. I don't want them to miss out on that.
THE COURT: Okay, good. Now, they won't.
MR. AHERN: Yeah.
THE COURT: Quiet over there.

(Jury in at 9:44 a.m.)

THE COURT: Good morning, everybody. Welcome back. I'm glad we all made it this far. Please be seated. I hope your brackets weren't busted over the weekend.

Members of the jury, I want to thank you, once again, for all of your time and patience over the last three weeks, and for serving as jurors in this matter. You sat through a lot of testimony, seen a lot of documents, and heard a lot from the lawyers. Now it's my turn. I'm going to read you the instructions that will guide your deliberations.

You have all heard all the evidence that has been admitted in this trial, and the arguments of counsel. It's my duty to give you the final instructions as to the law that is applicable to this case. Use these instructions to guide you in your deliberations. Before I begin, I should let you know that you'll receive a copy of these instructions in the jury room. So, you don't have to catch everything I say.

All the instructions of law I gave you at the beginning of the trial, during the trial, and these final instructions must guide and govern your deliberations. It is your duty to follow the law as stated in all the instructions of the Court, and to apply these rules of law to the facts as you find them from the evidence received during the trial. Counsel has referred to some of the applicable rules of law, and the Court's instructions. They are permitted to do so. In

fact, I gave them copies of these instructions last week. However, if any difference appears to you between the law, as stated by Counsel, and that as stated by the Court, you are to be governed by the Court's instructions.

You're not to single out any one instruction alone as stating the law. But you must consider the instructions as a whole in reaching your decisions. Likewise, you're not to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base any part of your verdict on any view or opinion of the law, other than those provided in the Court's instructions. Just as it would be a violation of your sworn duty as the judges of the facts to base your verdict upon anything, but the evidence received in this case, and your common sense.

I'm sure you have come to realize whatever you think you knew about trials, about evidence, or about the law as a result of watching T.V. shows, or movies, or reading novel, has no place here. No one involved in this case should be compared to any T.V. show. Well, if you like the lawyer in the show, compare him to me. A T.V. show, any movie, or any actor or actress, this trial was not scripted in that fashion ahead of time. You were chosen as jurors for this real-life trial to evaluate all of the evidence received, and to decide each of the factual questions presented to you.

As I mentioned, it is not uncommon, especially in long trials like this one, for there to be some lighthearted moments. But, as you know, this is an important and serious manner. You must not be persuaded by bias, prejudice, or sympathy for or against any of the parties to this case, or any public opinion.

You have two main duties as jurors. The first one is to decide what the facts are from the evidence that you saw and heard here in Court. Deciding what the facts are is your job, not mine. And nothing that I have said or done during this trial was meant to influence your decision about the facts, in any way. You are the sole judges of the facts.

Your second duty is to take the law that I give you and apply it to these facts, and the burden of proof that I will explain. My role is to instruct you about the law that you should apply to the facts as you find them. I remind you that you are bound by the oath that you took at the beginning of the trial to follow the instructions I give you. Even if you disagree with the law, you are not to consider whether the principles I state to you are sound, or whether they accord with your own views about policy. This includes instructions that I gave you before trial, during the trial, and these instructions, as well.

When you retire to the jury room to begin your deliberations, you should select one member of the jury as a

foreperson. That person will preside over the deliberations, and speak for you here, in open court. You will be given a list of the witnesses in the order in which they appear. Furthermore, if at some point you request the documentary evidence that was admitted as evidence, the exhibits will be provided to you.

You may also consult any notes you took during the trial. However, you should make use of them only as an aid to your own memory. Don't give your notes any precedence over your independent recollection of the evidence or lack of evidence. And neither should you be unduly influenced by the notes of other jurors. I emphasize that the notes you may have taken are not entitled to any greater weight than the memory or impression of each juror as to what the testimony or other evidence may have been. As jurors, you have a duty to consult with each other and to deliberate with the intention of reaching a verdict.

Each of you must decide the case for yourself, but only after a full and impartial consideration of all the evidence with your fellow jurors. Listen to each other carefully in the course of your deliberations. You should feel free to reexamine your own views, and to change your opinion based upon the evidence. But you should not give up your honest convictions about the evidence just because of the opinions of your fellow jurors, nor should you change your mind

just for the purpose of obtaining enough votes for a verdict.

During your deliberation, you should not talk to the Courtroom Deputy, to me, or to anyone but each other about the case. You must not communicate with or provide any information to anyone by any means about the case. You may not use any electronic device or media, such as a cell phone, smartphone, or computer of any kind, the internet, including any internet chatroom, blog, website, or social networking service, such as Facebook, Instagram, Twitter, and YouTube to communicate to anyone any information about this case, or to conduct any research about this case until I accept your verdict.

You may not use electronic means to investigate or communicate about the case. It is important that you decide this case based solely on the evidence presented in this courtroom. Information on the internet or available through the social media might be wrong, incomplete, or inaccurate. Information that you might see on the internet or on social media has not been admitted into evidence, and the parties have not had a chance to discuss it with you. You should not seek or obtain such information, and it must not influence your decision in this case.

If you have any questions or messages for me during your deliberations, you must write them down on a piece of paper, have the foreperson sign them, and give them to the jury officer. The officer will give them to me, and I will respond

as soon as I can. I may have to talk to the lawyers about what you've asked, so it may take some time to get back to you. One more thing about messages. Never write down or tell anyone how you stand on your votes. For example, do not write down or tell anyone that a certain member is voting one way or another. Your vote should stay secret until you are finished.

Your verdict must represent the considered judgment of each juror. In order for you, as a jury, to return a verdict, each juror must agree to the verdict. Your verdict must be unanimous. A document called a Verdict Sheet or Verdict Form has been prepared for you. It has a series of questions for you to answer. You will take this form to the jury room, and when you have reached unanimous agreement as to your verdict, you will fill it in and have your foreperson date and sign the form. You will then return to the courtroom, and your foreperson will give your verdict. Unless I direct you otherwise, do not reveal your answers until you are discharged.

After you have reached a verdict, you are not required to talk with anyone about the case, unless I order you to do so. Once again, I want to remind you that nothing about my instructions, and nothing about the verdict sheet is intended to suggest or convey in any way or manner what I think your verdict should be. It is your sole and exclusive duty and responsibility to determine the verdict.

This is a civil antitrust case. Winn-Dixie Stores,

Incorporated brought this lawsuit and is the Plaintiff. The parties against whom the lawsuit was brought are the Defendants. There are several Defendants in this litigation. I'll list them for you. Brownstone Mushroom Farms, Inc., C&C Carriage Mushrooms Company, Country Fresh Mushroom Company, Gino Gaspari and Sons, Inc., Giorgi Mushroom Company, Kaolin Mushroom Farms, Inc., Leone Pizzini and Son, Inc., Louis M. Marson, Jr., Inc., Modern Mushroom Farms, Inc., Monterey Mushrooms, Inc., Oakshire Mushroom Farms, Inc., Phillips Mushroom Farms, Inc., South Mill Mushroom Sales, Inc., The Eastern Mushroom Marketing Cooperative, Inc. EMMC, To-Jo Fresh Mushrooms, Inc., and United Mushroom Farm Cooperative, Inc.

The Plaintiff, Winn-Dixie, has the burden of proving its case against the Defendants by what is called a preponderance of the evidence. You may have heard the term, proof beyond a reasonable doubt, and I mentioned in the beginning of this trial, that is a stricter standard of proof and it applies only to criminal cases. It goes not apply in civil cases, such as this. So, you should put that concept out of your mind. The only standard you should consider in your deliberations is the preponderance of the evidence.

Preponderance of the evidence means that a plaintiff must prove, in light of all the evidence, that what it claims is more likely true than not true. To say it differently, if you were to put the evidence favorable to Winn-Dixie on one

side of a scale, and the evidence favorable to the Defendants on the other side of the scale, Winn-Dixie must have its side of the scale tipped downwards. If you find, after considering all of the evidence, that a claim or fact is more likely so than not so, or in other words, that side of the scale would tip slightly downwards, then that claim, or fact has been proven by a preponderance of the evidence. If you find, after considering all of the evidence, that Plaintiff has failed to meet its burden, either because the scales weigh in favor of Defendants, or the scales do not tip in favor of either Plaintiff or Defendants, the verdict must be for Defendants.

In determining whether any fact has been proven by a preponderance of the evidence, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of whether the Plaintiff or Defendants called it, and all exhibits received in evidence, regardless of who may have produced them. The evidence from which you are to find the facts consists of the following. The testimony of the witnesses, including the testimony presented via video deposition, documents, and other things received as exhibits, and stipulated facts that have been agreed to by the parties.

The following things are not evidence, statements of the lawyers, including opening and closing statements, as well as any remarks while they examine witnesses, arguments and questions of the lawyers, even if the lawyers' questions

sounded like they were based on facts. What the lawyers said is not evidence, unless I told you specifically you consider it so. This even includes those times when lawyers may have said they were summarizing testimony. So, if you remember the evidence differently from the attorneys, you should rely on your recollection. Objections by lawyers, even if their objections sounded as though they were based on something sounding like facts are not evidence. Any testimony I told you to disregard, or which I excluded from evidence. Anything you may have seen or heard about this case outside of the courtroom. You must make your decision based only on the evidence that you saw and heard in Court. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of Court influence your decision in any way.

You can and should use your common sense in weighing the evidence. Consider the evidence in light of your everyday experience with people and events and give it whatever weight you believe it deserves. So, if your experience tells you that certain evidence reasonable leads to a conclusion, you are free to reach that conclusion. There are rules that control what can be received into evidence. When a lawyer asked a question or offered an exhibit into evidence, and a lawyer on the other side thought that it was not permitted by the rules of evidence, that lawyer may have objected. Indeed, you heard plenty of objections in this trial.

Objections simply mean that the lawyer was requesting that I make a decision on a particular pool of evidence. Objections to questions, whether short or lengthy, are not evidence. Lawyers have an obligation to their clients to make objections when they believe that the evidence being offered is improper under the rules of evidence. Sometimes they are right. Sometimes they are not. You should not be influenced by the fact that there was an objection. If the objection was sustained, you are to ignore the question and any whole or partial answer to it. If the objection was overruled, treat the answer like any other.

Also, if certain testimony or other evidence was ordered struck from the record, you must disregard that evidence. Do not consider any testimony or other evidence that was excluded. Do not speculate about what a witness might have said, or what an exhibit might have shown. At times, I instructed you that you could only consider certain evidence for a particular limited purpose. In particular, I told you that with respect to the EMMC Noncompete Policy, you must only assess whether the existence of the noncompete, as well as the EMMC's purpose for implementing it makes it more likely that the EMMC also adopted the Minimum Pricing Policy and / or Target pricing. You must follow that instruction and may only consider that evidence for that limited purpose. It may not be used for any other purpose.

There are two types of evidence that you may use in reaching your unanimous verdict. One type of evidence is called direct evidence. An example of direct evidence is when a witness testifies about something that the witness knows through his or her own senses. Something the witness has seen, felt, touched, heard, or did. If a witness testified that she saw it raining outside, and you believed her, that would be direct evidence that it was raining.

The other type of evidence is circumstantial evidence. Circumstantial evidence is proof of one or more facts from which you could find another fact. If someone walked in the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining. You should consider both kinds of evidence that are presented to you. The law makes no distinction in the weight to be given to either direct or circumstantial evidence. You are to decide how much weight to give any evidence.

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You are the sole judges of the credibility of the witnesses. Credibility means whether a witness is worthy of belief. You may believe everything a witness says, only part of it, or none of it. In deciding what to believe, as I mentioned to you at the start of the trial, you may consider a

number of factors, including the following: The opportunity and ability of a witness to see, or hear, or know the things the witness testifies to; the quality of the witness's understanding and memory; the witness's manner while testifying; whether the witness has an interest in the outcome of the case, or any motive, bias, or prejudice; whether the witness is contradicted by anything the witness said or wrote before trial, or by other evidence; how reasonable the witness's testimony is when considered in the light of other evidence that you believe; and any other factors that bear on believability.

The weight of the evidence to prove a fact does not necessarily depend on the number of witnesses who testify. What is more important is how believable the witnesses were, and how much weight you think their testimony deserves. In fact, you may find that testimony of a small number of witnesses, or even one witness alone, as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

Inconsistencies or discrepancies in the testimony of a witness, or between different witnesses, may or may not cause you to discredit certain testimony. Two or more people experiencing an event may see or hear it differently. Similarly, just because a witness makes a mistake does not mean that a witness was not telling the truth. People may tend to

forget things or remember things inaccurately. In this case, some of these events occurred 15 to 20 years ago. You should not forget to use your commonsense when evaluating the testimony.

In weighing the effect of a discrepancy or mistake, you should consider whether it pertains to a matter of importance, or an unimportant detail, and whether the discrepancy results from innocent error or lapse in memory, as opposed to an intentional falsehood. Give the testimony of each witness such weight, if any, that you think -- that you may think it deserves. In short, you may accept or reject the testimony of any witness, in whole or in part.

As I mentioned a few moments ago, one of the types of evidence you may consider is deposition testimony. Deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath and swears to tell the truth. And lawyers for each party may ask questions. A court reporter is present and records the questions and answers. We watched several videos of depositions of certain witnesses who were not able to testify at the trial in person. The deposition testimony you viewed is entitled to the same consideration and is to be judged in the same way as if the witness had been present to testify at this trial in person.

You've heard testimony containing opinions from three individuals in this case, Dr. Keith Leffler for the Plaintiff,

Dr. David Beyer and Dr. Jesse David for the Defendants. Opinion testimony is testimony from a person who has a special skill or knowledge in a scientific or professional field. Their skill or knowledge is not common to the average person, but it has been acquired through their study, training, and / or experience. As a result, we refer to them as experts during this trial. But their testimony should be judged just like any other testimony. It is your obligation to determine their expertise, as well as the credibility and reliability of their testimony. The testimony of these witnesses is sometimes in conflict. That is, they disagree at times.

You must remember that you are the sole trier of the facts. And where their testimony relates to a question of fact, it is your job to resolve the disagreements. The way you resolve the conflict between these witnesses is the same way that you decide other fact questions, and the same way that you decide whether to believe ordinary witnesses. In weighing opinion testimony, you may consider a witness's qualifications, the reasons for their opinions, the soundness of their opinions, and the reliability of the information, assumptions, and data supporting their opinions.

You may also consider the other factors I have mentioned for weighing testimony of any other witness who provided non-opinion testimony. The opinions of these witnesses should receive whatever weight and credit, if any,

you think is appropriate, given all the other evidence in this case. Whether a witness's opinion relies on assumptions or mathematical models to arrive at his conclusions, you may consider whether the witness has properly justified the validity of those assumptions or mathematical models. You may also consider any bias that the witness has, including any bias that might arise from evidence that they have been or will paid for reviewing this case and testifying.

You should not permit a witness's opinion testimony to be a substitute for your own reason, judgment, and commonsense. You may reject the testimony of any opinion witness in whole or in part, if you conclude the reasons given in support of an opinion are unsound or if you, for other reasons, do not believe the witness. The determination of the facts in this case rest solely with you.

As you have heard, this case involves corporations, partnerships, unincorporated associations, and similar business entities. You should consider and decide this case as a dispute between persons of equal standing, or of equal worth in the community, and holding the same or similar stations in life. A corporation, partnership, or unincorporated association, or similar entity is entitled to the same fair trial as a private individuals. All persons, including corporations, partnerships, unincorporated associations, and other organizations stand equal before the law and are to be

treated as equals. The size or profitability of a company or corporations is irrelevant to the rights and obligations under the law. Therefore, you should consider and decide this case as a dispute between persons of equal standing in the community of equal worth, and holding the same or similar stations in life.

Under the law, a corporation and association or similar body is a person. But it acts only through its agents. Agents for such an organization include its directors, officers, employees, or others acting on its behalf. A corporation is not capable under the law of conspiring with its own agents, unincorporated divisions, or its wholly owned subsidiaries. Through its agents, however, such an organization is capable of conspiring with other outside persons or independent organizations.

A corporation or other such organization is legally bound by the acts and statements of its agents done or made within the scope of the agent's employment or apparent authority. Acts done within the scope of employment are those performed on behalf of the corporation and directly related to the performance of the duties the agent has general authority to perform. Apparent authority is the authority that persons outside the corporation could reasonably believe the agent would have judging from his or her position with the organization, the responsibilities previously entrusted to the

person or the office, and the circumstances surrounding his or her past conduct.

To summarize, for a corporation to be legally responsible for the acts or statements of its agents, you must find that the agent was acting within the scope of his or her employment with actual or apparent authority. Again, an organization is entitled to the same fair trial as a private individual. Its acts are to be judged by the same standard as the acts of a private individual, and you may hold an organization liable only if such liability is established by the preponderance of the evidence. Once again, that is because all persons, including corporations, are equal before the law.

Plaintiff's claim arises under § 1 of a federal law called the Sherman Act. The purpose of the Sherman Act is to preserve free and unfettered competition in the marketplace. § 1 of the Sherman Act prohibits contracts, combinations, and conspiracies that unreasonably restrain trade. Such a restraint must affect interstate commerce. I'm instructing you that the interstate commerce requirement has already been met, and therefore, you need not consider that requirement in your deliberations.

Accordingly, you'll be asked to answer the following questions. Was there a contract, combination, or conspiracy between or among at least two separate entities? Two, did that contract, combination, or conspiracy unreasonably restrain

trade? Three, did the contract, combination, or conspiracy cause Plaintiff to suffer an injury to its business or property by paying higher prices than it would have paid without the contract, combination, or conspiracy? If you answer yes to these questions, you will also determine the proper amount of damages to award the Plaintiff. I will instruct you on damages later on.

In order to prove a relevant contract, combination, or conspiracy, Plaintiff must prove the following by a preponderance of the evidence. One, an alleged contract, combination, or conspiracy existed. Two, a Defendant knowingly became a member of the conspiracy. To act knowingly means to participate deliberately and not because of a mistake or accident. The basis of a conspiracy is an agreement or understanding between two or more persons or entities. An agreement or understanding between two or more persons or entities exists when they share a commitment to a common scheme. A written agreement or contract may satisfy the contract, combination, or conspiracy element of a § 1 claim under the Sherman Act.

But to establish the existence of a conspiracy, the evidence need not show that its members entered into any formal or written agreement. The agreement, itself, may have been entirely unspoken. A person can become a member of a conspiracy without full knowledge of all the details of the

conspiracy, the identity of all its members, or the parts such members played in the charged conspiracy. The members of the conspiracy need not, necessarily, have met together, directly stated what their object or purpose was to one another, or stated the details or means by which they would accomplish their purpose.

But to prove a conspiracy existed, the evidence must show that the alleged members of the conspiracy came to an agreement or understanding among themselves to accomplish a common purpose. A conspiracy may be formed without all parties coming to an agreement at the same time, such as where parties separately accept invitations to participate in a place to restrain trade at different times.

Similarly, it is not essential that all persons act exactly alike, nor is it necessary they all possess the same motive for entering the agreement. It is also not necessary that all the means or methods claimed by Plaintiff were agreed upon to carry out the alleged conspiracy, nor that all of the means or methods that were agreed upon were actually used or put into operation, nor that all the persons alleged to be members of the conspiracy were actually members. It is the agreement or understanding to restrain trade within the meaning of § 1 of the Sherman Act that constitutes a conspiracy, regardless of whether the conspiracy actually succeeded or failed.

Plaintiff may prove the existence of the alleged conspiracy through direct evidence, circumstantial evidence, or both. As I mentioned earlier, direct evidence is explicit and requires no inferences to establish the existence of the alleged conspiracy. Direct evidence of an agreement may not be available, and therefore, a conspiracy also may be shown through circumstantial evidence. You may infer the existence of a conspiracy from the circumstances, including what you find the alleged members actually did and the words they used. Mere similarity of conduct among various persons, however, of the fact that they may have associated with one another, and may have met or assembled together, does not, by itself, establish the existence of a conspiracy.

If they acted similarly but independently of one another, without any agreement among them, then there would not be a conspiracy. In determining whether an agreement or understanding between two or more persons has been proved, you must view the evidence as a whole, and not piecemeal. If you find that Plaintiff has proven by a preponderance of the evidence that there was an overarching conspiracy to charge supercompetitive prices, then you must determine which Defendants, if any, were members of that conspiracy. If you find that Plaintiff has failed to prove by a preponderance of the evidence that there was an overarching conspiracy to charge supercompetitive prices, then you must find in Defendants favor

on this claim. And you must discontinue any further evaluation of Plaintiff's alleged claim.

Before you can find that any given Defendant was a member of the conspiracy alleged by the Plaintiff, the evidence must show that this particular Defendant knowingly joined in the unlawful plan at its inception or at some later time with the intent to further the purpose of the conspiracy. To act knowingly means to participate deliberately, not because of mistake or accident. A person may become a member of a conspiracy without full knowledge of all the details of a conspiracy, the identity of all its members, or the parts they played. Knowledge of the essential nature of a plan is enough.

On the other hand, a person who has no knowledge of the conspiracy but happens to act in a way that helps the conspiracy succeed does not thereby become a conspirator. The mere fact that a particular Defendant may have engaged in certain actions that were consistent with the overall conspiracy alleged by the Plaintiff does not necessarily mean that this Defendant acted knowingly in joining a conspiracy. There are several Defendants in this case. You must decide the case as to each Defendant, separately, even though there are multiple Defendants, and some of the evidence and issues may be common across Defendants.

In determining whether the Defendant was a member of the alleged conspiracy, you should consider only the evidence

about that particular Defendant's statements and conduct, including any evidence of that Defendant's knowledge and participation in the events involved, and any other evidence of that particular Defendant's participation in the conspiracy alleged. You may not find that a Defendant was a member of a conspiracy based only on its association with or knowledge of wrongdoing. However, this is a factor you may consider in order to determine whether a Defendant was a member of the alleged conspiracy.

If you find that Plaintiff has proven that a Defendant acted knowingly, or with intent to further the conspiracy, then you should continue to evaluate the remainder of Plaintiff's alleged claim as to that Defendant. If you find the Plaintiff has failed to prove that one or more Defendant's acted knowingly or with intent to further the conspiracy, then you must find in the Defendant's favor on that claim as to that Defendant, and you must discontinue any further evaluation of Plaintiff's alleged claim as to that Defendant.

If you find that the alleged unlawful contract, combination, or conspiracy existed, then unless the Court has instructed otherwise, the acts and statements of the participants in that contract, combination, or conspiracy are binding on all other participants you find to have knowingly joined the contract, combination, or conspiracy. A person who knowingly joins an existing conspiracy, or who participates

only in part of a conspiracy with knowledge of the overall conspiracy is just as responsible as if he or she had been one of those who formed or began the conspiracy and participated in every part of it.

Member of a conspiracy may withdraw from the conspiracy. To find that a member of a conspiracy has withdrawn from or abandoned the conspiracy, the evidence must show that a Defendant, one, undertook affirmative steps inconsistent with the object of the conspiracy to disavow or defeat the goal or purposes of the conspiracy, and two, acted in a manner reasonably calculated to notify coconspirators that it was no longer participating in the conspiracy. Mere inactivity in the conspiracy is not proof of withdraw. Furthermore, even if a Defendant tells others of its intention to withdraw, it is not withdrawn if it continues to act in furtherance of the object of the conspiracy.

If you have concluded that a Defendant was a member of a conspiracy, that Defendant bears the burden of proving by a preponderance of the evidence that it withdrew from the conspiracy. There must be evidence of some affirmative act of withdraw. I'm instructing you now that if you find United Mushroom Farm Cooperative, Inc. joined the alleged conspiracy, then you must find that it withdrew from the alleged conspiracy as of August 31, 2005.

There are three Defendants who allege they withdrew

from the conspiracy. It is up to you to determine whether they have satisfied their burden of showing by a preponderance of the evidence that they withdrew. Those Defendants are Gino Gaspari and Sons, Inc., Monterey Mushrooms, Inc., and Oakshire Mushroom Farm, Inc. If you find that a party has withdrawn from a conspiracy, you must then determine the extent of the damages for which that party may be liable. A party that withdraws from a conspiracy is liable for damages flowing from its conduct, and the conduct of its coconspirators, while it was a member of the conspiracy, even if the damages occurred after its withdraw. As long as the conduct occurred before its withdraw, and the conduct caused damages that occurred after withdraw. Plaintiff has the burden of proving what portion of damages are attributable to acts of the conspiracy prior to a Defendant's withdraw.

Not every contract combination or conspiracy violates § 1 of the Sherman Act. There are two different tests for you to determine whether a contract, combination, or conspiracy violates § 1 of the Sherman Act. The test you will be applying in this case is called The Rule of Reason. I will instruct you now on this test.

Plaintiff's claim alleges that Defendants engaged in an overarching conspiracy to raise the price of agaricus mushrooms through circulating minimum and / or target price lists or by acquiring properties that were historically used

for mushroom farming to reduce or limit the supply of fresh agaricus mushrooms. These activities must be part of a single overarching conspiracy as opposed to two different and independent conspiracies. To prevail on this claim, Plaintiff must show that a Defendant entered into a single overarching conspiracy with two aspects. One, circulation of minimum or target prices lists along with rules and regulations requiring EMMC members to charge those prices, and two, acquiring properties that were historically used for mushroom farming to reduce or limit the supply of fresh agaricus mushrooms, including by placing deed restrictions on the properties to prevent their future use as mushroom farm.

Plaintiff must show by a preponderance of the evidence that each Defendant joined the alleged conspiracy, that the conspiracy was anticompetitive by depriving the marketplace of competition and resulting in prices higher than they would have otherwise been, and that Winn-Dixie was injured by the conspiracy. To determine whether these alleged restraints constitute one conspiracy, you must look to one, whether there was a common goal among the conspirators. And two, whether their agreement contemplated bringing to pass a continuous result that will not continue without the continuous cooperation of conspirators. And three, the extent to which the participants overlap in the various dealings. If, after considering these factors, you find that these alleged

restraints are part of the same conspiracy, only then must you determine if the actions taken were reasonable or unreasonable. There are a number of steps to this inquiry, which I will first summarize before going into detail.

If you find such an overarching conspiracy, you will be asked to determine whether the restraint was unreasonable. Under the Rule of Reason, you must decide whether the Defendants overarching conspiracy I just described unreasonably restrained trade. This involves a multistep analysis, which I will outline briefly now, and explain in more detail.

Initially, you must determine whether Plaintiff has proven that the challenged restraint resulted in a substantial harm to competition in a relevant product and geographic market. If you find that Plaintiff has proven that the challenged restraint results in a substantial harm to competition in a relevant market, then you must consider whether the restraint reduces countervailing competitive benefits. If you find that it produces countervailing competitive benefits, then you must balance the competitive harm against the competitive benefit. The challenge restraint is illegal under § 1 of the Sherman Act, only if you find that the competitive harm substantially outweighs the competitive benefit.

As I just mentioned, in order to prove a challenged restraint is unreasonable, the Plaintiff must demonstrate that

the restraint resulted in substantial harm to competition in a relevant market, Harm that occurs merely to the Plaintiff's individual business is not sufficient, by itself, to demonstrate harm to competition generally. Rather, harm to competition must be shown in a broader market, called the relevant market. There are two aspects of a relevant market. One, a relevant product market, and two, a relevant geographic market. It is Plaintiff's burden to prove the existence of a relevant market for restraints evaluated under the Rule of Reason. I will now explain the definitions of relevant product and relevant geographic markets.

One common way to think about the relevant product market is whether various products are interchangeable for one reason or another, or whether they are considered substitutes for one another. If they are, then it is likely they are part of a single product market. Products need not be identical or precisely interchangeable, as long as they are reasonable substitutes. To determine whether products are reasonable substitutes for one another, you must consider whether a small insignificant and nontransitory increase in the price of one product would result in enough customers switching from that product to another product such that the price increase would not be profitable. In other words, would customers accept the price increase and continue buying the original product or will so many switch to alternative products that the price increase

will be withdrawn?

If you find that customers would switch to alternative products and the price increase would not be profitable, you must conclude the products are in the same product market. If, on the other hand, you find that customers would not switch, then you must conclude that the two products are not in the same product market. In this case, Plaintiff contends the relevant product market is fresh agaricus mushrooms sold only to fresh customers. Defendants argue that Plaintiff failed to prove a proper relevant product market because it did not account for agaricus mushrooms of fresh market quality that was sold to non-fresh customers, such as processors.

The relevant geographic market is a given geographic area where the Plaintiffs must show harm. Plaintiff has the burden of proving a relevant geographic market exists by a preponderance of the evidence. Plaintiff claims the relevant geographic market is the entire nonwestern United States. Defendant asserts the market is actually made up of a series of regional markets. If you find that Plaintiff has proven a relevant product and geographic market, you should continue to evaluate the remainder of Plaintiff's claim. If you find that Plaintiff has not proven a relevant product or geographic market, you should find in favor of Defendants on this claim and discontinue further evaluation of this claim.

To prove that the challenge restraint is unreasonable,

Plaintiff must demonstrate that it has resulted in substantial harm to competition. As I mentioned earlier, harm that occurs merely to the individual business of a Plaintiff is not sufficient by itself to demonstrate harm to competition generally. Rather, harm to competition must be shown in the relevant market.

In this case, because the alleged restraint evaluated under the Rule of Reason includes minimum and target prices, coupled with a supply control program, a harmful effect on competition refers to a reduction in competition with respect to mushroom prices that results in higher prices than there would have been absent these restraints. If the challenged conduct has not resulted in prices higher than the competitive level, then there has been no competitive harm, and you should find that the challenged conduct was not unreasonable.

The Plaintiff can satisfy its burden either by directly proving the existence of an actual anticompetitive effect in a relevant market. In this case, higher mushroom prices than there would have been without the restraint, or by proving the Defendants had market power in the relevant market. In determining whether the challenged conduct has produced competitive harm, you may look at the following factors: The effect of the restraint on prices, output, product quality, and service; the purpose and nature of the restraint; the nature and structure of the relevant market; the number of competitors

in the relevant market, and the level of competition among them, both before and after the restraint was imposed; any facts unique to the fresh agaricus mushroom industry; and whether a Defendant and its alleged coconspirators, together, possessed market power. The last factor, market power, has been defined as an ability to profitably raise prices for a sustained period of time above those that would be charged in a competitive market.

A firm or firms that possess market power, generally, can charge higher prices for the same goods and services than a firm in the same market that does not possess market power. The ability to charge higher prices for better products or services, however, is not market power. An important factor in determining whether a Defendant possess market power is the Defendant's market share, that is, it's percentage of the products or services sold in the relevant market by all competitors. If Defendants do not possess a substantial market share, it is less likely that Defendants possess market power. If Defendants do not possess market power, it is less likely that the challenged restraint has resulted in a substantial harmful effect on competition in the market.

If you find that Plaintiff has proven that the challenged restraints resulted in substantial harm to competition in a relevant market, you must determine whether the restraint also benefits competition in other ways. The

Defendants bear the burden of showing procompetitive benefits. In considering whether the challenged restraint benefitted competition, you may consider various factors, including but not limited to increase production, increased consumer choice, increased service, decreased prices, or improved product quality. You may not consider increased producer prices, increase producer profits, decreased producer losses, or helping firms stay in operation as procompetitive benefits.

If you find that the challenged restraints results in competitive benefits, then you also must consider whether the restraint was reasonably necessary to achieve the benefits. If the Plaintiff proves that the same benefits could have been readily achieved by other reasonably available alternative means that creates substantially less harm to competition, then those claimed benefits cannot be used to justify the restraints.

If you find that the challenged restraint was reasonably necessary to achieve competitive benefits, then you must balance those competitive benefits against the competitive harm resulting from the same restraint. If the competitive harm substantially outweighs the competitive benefits, then the challenged restraint is unreasonable. If the competitive harm does not substantially outweigh the competitive benefits, then the challenged restraint is not unreasonable.

In conducting this analysis, you must consider the

benefits and harm to competition and consumers, not just to a single competitor or group of competitors. The Plaintiff bears the burden of proving that the anticompetitive effect of the conduct substantially outweighs its benefits. If you find that Plaintiff has proven the anticompetitive effects of the conduct substantially outweighs the procompetitive benefits, you should find in favor of the Plaintiff. If you find that Plaintiff has failed to prove the anticompetitive effects of conduct substantially outweigh the procompetitive benefits, you must find in Defendant's favor.

Under the Sherman Act, it is not a defense that Defendants may have acted with good motives, thought their conduct was legal, or that the conduct may have some good results. During this trial, you have heard discussion of the Eastern Mushroom Marketing Cooperative, or EMMC, which is a cooperative organization. Business that are actual or potential competitors, such as the Defendants here, may lawfully form into associations to advance common interests. They may also meet and communicate with one another in furtherance of lawful activities. For example, trade associations may keep members informed of new services or technology in the industry, or perform other valuable services, such as cooperative research, publication of trade journals, or joint representation before legislative or administrative bodies.

However, an association is capable of committing violations of the antitrust laws. The actions of a group of competitors taken through an association to which they belong present the same issues as the actions of a group of competitors who have not created a formal organization, such as a trade association. A trade association, or similar industry group, cannot lawfully act to raise, stabilize, or maintain prices in the market in which its members compete with one another, or to reduce members collective output of products or services. These activities constitute an agreement between the association and its members in violation of the Sherman Act, even if the association has not conspired with a nonmember. Under these circumstances, the trade association or industry group is one of the coconspirators or participants in the unlawful agreement.

A business that belongs to a trade association does not become liable for violating the antitrust laws simply because the trade association is liable for such violation. Instead, Plaintiff must prove that the member of the trade association knew of and participated in the conduct you find unlawful. Identification of a particular Defendant's membership or role in the organization is not sufficient to show that a particular Defendant agreed to the conspiracy, itself.

The Plaintiff contends that all Defendants engaged in

similar conduct, namely setting prices in accordance with prices set forth in a series of price lists. The Plaintiff further contends that this conduct, when considered with other evidence, shows that a conspiracy existed among all Defendants. The mere fact that certain Defendants may have raised prices simultaneously does not, by itself, establish the existence of a conspiracy among Defendants. Their behavior may be no more than a result of exercise of independent judgment in response to identical or similar market conditions. For example, everyone might open their umbrellas on a rainy day. But that similar behavior would not necessarily mean they had agreed or conspired to open their umbrellas.

Moreover, under certain conditions, a business may lawfully adopt the same prices, conditions of sale, or other practices as its competitors, as long as it does so independently, and not as part of an agreement or understanding with one or more of its competitors. If Defendants acted similarly but independently of one another, without any agreement or understanding between two or more of them, there would not be a conspiracy. You must decide whether each individual Defendants allegedly similar conduct was more probably than not the result of an agreement or understanding among them. In doing so, you may consider the conduct of each individual Defendant, along with other evidence. You cannot infer that a conspiracy existed unless you find that the

evidence, when viewed as a whole, make it more likely than not that the Defendants had an agreement or understanding with one another to engage in unlawful conduct, as I have explained, as opposed to acting independently of one another.

In making this determination, you should consider the similar conduct against the entire background in which it took place. The evidence, when viewed all together, must satisfy you that it is more likely that Defendants similar actions were the product of an agreement or understanding with one another, and their own independent decisions. If, after considering all the evidence, you conclude that Plaintiff showed by a preponderance of the evidence as to a given Defendant that the Defendant's similar conduct was the product of an agreement or understanding with other Defendants, rather than its own independent decision, you must find for Plaintiff on the question of whether that Defendant participated in a conspiracy. However, if you find that Plaintiff has failed to satisfy its burden of proof as to each Defendant, that the Defendant -- let me start again.

However, if you find that Plaintiff has failed to satisfy its burden of proof as to each Defendant, that the Defendant participated in a conspiracy, you must return a verdict for that Defendant. If you find that Plaintiff satisfied its burden of proof with respect to its claim against any Defendants, you must also decide whether Plaintiff is

entitled recover any damages from those particular Defendants. Plaintiff cannot recover any damages for an injury to its business or property from any Defendant unless Plaintiff first establishes three elements of injury and causation. One, Plaintiff was, in fact, injured as a result of Defendants alleged violation of the antitrust laws. Two, a Defendant's alleged illegal conduct was a material cause of Plaintiff's injury. And three, Plaintiff's injury is an injury of the type that the antitrust laws were intended to prevent. I will now explain each of these elements.

The first element is sometimes referred to as injury in fact or fact of damage. For the Plaintiff to establish that it's entitled to recover damages, it must prove that it was injured as a result of Defendant's alleged violation of the antitrust laws. This requires that Plaintiff proves that it was in fact injured by a Defendant's alleged antitrust violation, but it does not require that Plaintiff prove the exact dollar amount of its injury. If you find that Plaintiff has established by a preponderance of the evidence that it was, in fact, injured, you may then consider the amount of Plaintiff's damages, if any. If you find that Plaintiff has failed to prove by a preponderance of the evidence that it was injured by any Defendant's alleged antitrust violation, you cannot consider the amount of any damages, and you must return a verdict in favor of Defendants. It is important to

understand that injury and amount of damage are different concepts and that you cannot consider the amount of damage unless and until you have concluded that the Plaintiff has established that they were, in fact, injured.

Next, Plaintiff must also establish by a preponderance of the evidence that Defendants' alleged illegal conduct was a material cause of Plaintiff's injury. This means that Plaintiff must prove that it suffered some injury as a result of the alleged antitrust violation and not some other cause. Plaintiff is not required to prove that the alleged antitrust violation was the sole cause of its injury, nor need Plaintiff eliminate all other possible causes of its injury. It is enough if Plaintiff has proven that the alleged antitrust violation was a material cause of its injury.

Finally, Plaintiff must establish that its injury is the type of injury that the antitrust laws were intended to prevent. This is sometimes referred to as antitrust injury. If Plaintiff's injuries were caused by a reduction in competition, acts that would lead to a reduction in competition, or acts that would otherwise harm competition or consumers, then Plaintiff's injuries are antitrust injuries. For example, if the injury suffered by the Plaintiff is the price it paid for mushrooms being higher than it would have been absent the unlawful restraint, then that would constitute antitrust injury. On the other hand, if Plaintiff's injuries

were caused by heightened competition, the competitive process, itself, or by acts that would benefit consumers, then Plaintiff's injuries are not antitrust injuries, and Plaintiff may not recover damage for those injuries under the antitrust laws. In summary, if Plaintiff can establish that it was, in fact, injured by a Defendant's conduct, that Defendant's conduct was a material cause of Plaintiff's injury, and that the injury was the type of injury that the antitrust laws were intended to prevent, then Plaintiff is entitled to recover damages for the injury to its business or property.

Damages are the amount of money you may award to Plaintiff because of Defendants' violation of the antitrust laws. If you reach a verdict for the Defendants and determine they did not violate the antitrust laws, you should not consider the issue of damages, and you may disregard the damages instruction that I am about to give. If, however, you find that any Defendants violated the antitrust laws, and that this violation caused injury to the Plaintiff, then you must determine the amount of damages, if any, Plaintiff is entitled to recover. The fact that I'm giving you instructions concerning the issue of Plaintiff's damages does not mean that I believe Plaintiff should or should not prevail in this case.

The law provides that Plaintiff should be fairly compensated for all damages to its business or property that were a direct result or likely consequence of the conduct that

you have found to be unlawful. Antitrust damages are only compensatory, meaning their purpose is to put an injured Plaintiff as near as possible to the position in which it would have been had the alleged antitrust violation not occurred. The law does not permit you to award damages to punish a wrongdoer, what we sometimes refer to as punitive damages, or to deter a particular conduct in the future. Furthermore, you are not permitted to award to Plaintiff an amount for attorney's fees or the costs of maintaining this lawsuit.

In this case, Plaintiff claims that Defendant's unlawfully increased prices of agaricus mushrooms above the level they would have been in the absence of Defendant's unlawful activity. If you determine that any Defendants violated § 1 of the Sherman Act, and Plaintiff was injured as a result, you must award damages of the reasonably estimated extra amount that Plaintiff paid for mushrooms because of the violation. In other words, the amount of damages is the different between what Plaintiff actually paid and what it would have paid in the absence of Defendants conduct. You must not decrease Plaintiff's damages, even if it avoided harm in some way. Plaintiff has the burden of proving its reasonably estimated damages by the preponderance of the evidence.

You are permitted to make just and reasonable estimates in calculating Plaintiff's damages. You are not required to calculate damages with mathematical certainty or

precision. However, damages must have a reasonable basis in the evidence and must be based on reasonable assumptions and estimates. Damages may not be based on guesswork or speculation. Plaintiff must prove the reasonableness of each of the assumptions upon which the damages calculation is based. If you find that Plaintiff has provided a reasonable basis for determining damages, you may award damages based on just a reasonable estimate supported by the evidence. If you find that Plaintiff has failed to carry its burden of proving a reasonable basis for determining damages, such that a damages calculation cannot be based on evidence and reasonable inferences, and can only be reached through guesswork or speculation, you may either not award damages, or award nominal damages not to exceed $1.

Plaintiff is claiming overcharges on purchases that it made directly from Defendants, as well as on purchases it made from distributors allegedly related to Defendants. In particular, Plaintiff claims to recover damages for purchases it made from nonparty Oakshire Mushroom Sales, OMS. To recover damages on purchases from a distributor allegedly related to a Defendant, you must find that a distributor was owned or controlled by a Defendant who was a coconspirator.

So, in this case, you must find that OMS was owned or controlled by Oakshire Mushroom Farms, Inc., OMF, and that OMF was a member of a conspiracy. OMS can be said to be owned or

controlled by OMF, where OMS and OMF are functionally the same entity, such that there is in effect a direct sale to Winn-Dixie from OMF. In other words, Plaintiff must show that OMF owned or had such control over OMS that OMF can be said to have set the prices for OMS's sales to Winn-Dixie. In assessing whether a distributor and a Defendant have such a relationship, you may consider overlapping or joint ownership, financial independence, and / or joint decision making between the Defendant and its distributor, whether through a corporation or other business entity or individual.

However, under the law, two entities under common control cannot conspire with one another. In other words, if a Defendant makes an agreement with another entity, with which it is under common control, but does not form an agreement with any other entity, then that Defendant did not enter into a conspiracy. In sum, Plaintiff may not recover damages based on overcharges for mushrooms it purchased from OMS, unless it shows by a preponderance of the evidence, one, it purchased mushrooms from OMS, two, OMS was owned or controlled by OMF such that they are functionally the same entity, and three, OMF was a coconspirator. If you find that OMF participated in the conspiracy, and that OMF and OMS are commonly owned or controlled, then you may award damages based on Plaintiff's purchased of mushrooms from OMF, OMS, and any other conspiracy member.

As I discussed earlier, there are multiple Defendants in this case. Each participant in an agreement or conspiracy that violates the antitrust laws is jointly and severally liable for all of the damages resulting from the conspiracy. This means that each participant in the agreement or conspiracy is fully liable for all of the damages caused by the conspiracy, and not solely for damages caused by an individual conspirator. One who knowingly joins an ongoing conspiracy is liable for all previous acts of the other participants in the agreement or conspiracy in furtherance of the conspiracy.

If you find that any particular Defendant was not a member of the conspiracy, then that Defendant would not be liable for any damages based on Plaintiff's purchases from that Defendant. If you find that Plaintiff has proven the existence of the alleged conspiracy, and that a Defendant participated in a conspiracy, and that Plaintiff is entitled to recover damages based on the other instructions in this case, then that Defendant, absent withdraw, would be liable for all damages caused by the conspiracy, including any overcharges paid by the Plaintiff for products purchased from another participant in the agreement or conspiracy.

If you find that a particular Defendant withdrew from the conspiracy, that Defendant is no longer jointly and severally liable for any damages caused by acts taken by the conspiracy after the withdraw. Therefore, a special Verdict

Form instructs you to answer the question of which Defendants, if any, you find withdrew from the conspiracy, on what date those Defendants withdrew, and what portion of the damages, if any, for each claim you find the Defendant jointly and severally liable.

In calculating the total overcharge damages attributable to the conspiracy, you can only consider those sales on which the conspiracy was able to cause an actual overcharge. If you find that a particular Defendant withdrew from the conspiracy and that the conspiracy therefore no longer caused an overcharge to be paid on that Defendant's sales, then those sales should not be included in your calculation of the total overcharge damages. A party that withdraws from a conspiracy is only liable for damages flowing from its conduct and the conduct of its coconspirators before it withdrew, even if the damages occurred after its withdraw, as long as the conduct causing the damages occurred before its withdraw. Plaintiff has the burden of proving what portion of damages are attributable to acts of the conspiracy prior to a Defendant's withdraw.

Okay. I'm still here. And you're still here. So --

COURT OFFICER: I have the verdict sheets, jury instructions, and the two (indiscernible).

THE COURT: I'm sending out two copies of the charge for the jury, as well as the two exhibits that have been

admitted into evidence that there's a dispute on the dates of withdraw for the jury to have in their possession. And good luck. Again, if you have any questions, whoever you elected as foreman, notify the Court in written.

What was that, an hour-and-a-half?

COURT OFFICER: Just about, yeah. Just under an hour-and-a-half. Less.

THE COURT: I don't know is somebody close to the microphone? All right. All right. Be seated. Usually we get a question right away, so hang on.

COURT OFFICER: Want more water?

THE COURT: Yeah.

COURT OFFICER: Anything else?

THE COURT: What?

COURT OFFICER: Anything else?

THE COURT: Yes. A sedative. Thank you.

MR. BRUNELLI: Your Honor, may I use the restroom?

THE COURT: What's that?

MR. BRUNELLI: May I use the restroom?

THE COURT: Oh, sure. I don't know if anyone else wants to take a break?

MR. AHERN: I got to go home this weekend.

THE COURT: Oh, that's good.

MR. AHERN: Yeah. Yeah.

THE COURT: I can tell you did. The wife wouldn't let

you come back here without a shave. I know.

MR. AHERN: Got to play double squash twice. That was good.

THE COURT: You all have to deal with that. I did.

MR. AHERN: Your Honor, this is Sandy Brown (phonetic), the General Counsel of Southeastern (indiscernible).

THE COURT: Hi. Come on up. You don't have to sit there. Sit at the counsel table, yeah. I mean, you're paying him. You can claim whatever you want.

MR. BROWN: I passed the bar a couple of times, so, thank you sir.

THE COURT: You're the General Counsel for -- did I -- what did I hear -- what's his title?

MR. AHERN: I'm sorry, Chief Legal Officer.

MR. BROWN: Chief Legal Officer, Southeastern Grocers, Incorporated. They took me from General Counsel to Chief Legal Officer so they didn't have to pay me any more money. You get a new title. That should be good.

THE COURT: So, you're a CLO.

MR. BROWN: Yes. (Indiscernible).

THE COURT: You're the CLO Fellow. Okay.

(Jury out at 11:06 a.m.)

(Recess at 11:06 a.m., until 2:16 p.m.)

THE COURT: Be seated. This is a question. They want

Leffler and David's presentation for reference.

MR. AHERN: Right, and then they --

THE COURT: They drew a graph of some kind. Chris, why don't you give them -- let them look at it and tell me what they think the question is.

MR. DESTEFANO: Well, the question seems to be --

THE COURT: You don't know the question. Take a look at the question.

MR. DESTEFANO: No, no, I looked at it already.

THE COURT: Oh, you looked at it already?

MR. DESTEFANO: Yeah.

THE COURT: Oh, okay.

MR. DESTEFANO: It seems that they're asking for the PowerPoint presentations of both experts, and then they drew a chart, and we're not sure whether that's just an example, or whether that's just that chart, or whatever. We're not sure. The problem with any of that stuff is, it did not come into evidence. It was used for demonstrative purposes only and we're not sure what to do, under those circumstances, if anything.

MS. SHIELDS: I agree with Mr. DeStefano.

MR. AHERN: Yeah.

THE COURT: Clear as a bell, right?

MR. AHERN: Exactly. Exactly. Well, Your Honor, I mean, they've clearly said it's just for reference. So I don't

-- I mean, and Your Honor can say that this was not admitted into evidence.

THE COURT: That's what I mean, they have to use their memory.

MR. AHERN: Well, but --

THE COURT: It wasn't admitted.

MR. AHERN: But if they're asking for it, you can give them the instruction that it's not admitted into evidence.

THE COURT: Right.

MR. AHERN: But, in terms of what it is, it's either, you know, something like this slide, or it's the scatterplot. But there are a number of slides that are -- that relate to Winn-Dixie prices paid. And it might be the scatterplot that has --

THE COURT: The bottom line is, it was not admitted into evidence. They have to use their best recollection.

MR. AHERN: Got it, I don't know that --

MR. DESTEFANO: I think that's (indiscernible).

MR. AHERN: I mean, I don't think -- I mean, these types of things -- none of these types of things are ever admitted into evidence, I don't think, in cases like this.

THE COURT: Well, that's not true. I've had trials where things were -- charts and everything were admitted into evidence.

MR. AHERN: Okay.

THE COURT: In fact, the one about who resigned, and so on --

MR. AHERN: Right.

THE COURT: -- was admitted into evidence and that was a chart.

MR. DESTEFANO: Right.

THE COURT: So --

MR. AHERN: Your Honor, we would say that, if they've asked for it for reference, then they can be provided to with the limiting instruction.

THE COURT: And what, this is for reference only?

MR. AHERN: Well, that's what they said. That's what they said. You know, I would just say that you'd be --

THE COURT: It wasn't admitted into evidence. I can't send it out. Let's throw these two out of here. Chris, I'm saying that it was not admitted into evidence. Use your best recollection.

(Recess from 2:22 p.m., until 2:25 p.m.)

MR. DESTEFANO: Has to be the same answer.

THE COURT: What's that?

MR. DESTEFANO: Has to be the same answer.

THE COURT: I don't remember the chart. What chart is it?

MR. DESTEFANO: It's the chart that both experts used. I used it in closing. Yeah, that's one version of it.

Mg EKG. Your Honor referred to it as an EKG.

MR. AHERN: Based on the actual data, and it was used by both --

MR. DESTEFANO: Well, it was a different version (indiscernible). But again --

THE COURT: Neither one -- none of them was admitted.

MR. DESTEFANO: No.

THE COURT: Chart not admitted into evidence. Use best recollection. That's all I can say.

(Recess at 2:28 p.m., until 2:38 p.m.)

(Jury in 2:39 p.m.)

THE COURT: All right, welcome back. Everyone please be seated.

COURT OFFICER: Foreperson of the jury, please rise. Members of the jury, in the matter of Winn-Dixie Stores, Inc., et al vs. Eastern Mushroom Marketing Cooperative, Inc., Civil Action Number 15-6480, as to question 1, do you find by a preponderance of the evidence that there was a single overarching conspiracy to raise the prices of agaricus mushrooms by, one, circulating minimum or target price lists along with rules and regulations requiring EMMC members to charge those prices, and two, acquiring properties that were historically used for mushroom farming to reduce or limit the supply of fresh agaricus mushrooms, including by placing deed restrictions on the properties to prevent their future use as

mushroom farms. Yes, or no?

JURY FOREMAN: Yes.

COURT OFFICER: Question two, do you find by a preponderance of the evidence that any of the following Defendants participated in the above-described single overarching conspiracy to raise the prices of agaricus mushrooms, A, Brownstone Mushroom Farms, Inc., yes or no?

JURY FOREMAN: No.

COURT OFFICER: B, C&C Carriage Mushroom Company, yes, or no?

JURY FOREMAN: No.

COURT OFFICER: C, Country Fresh Mushroom Company, yes, or no?

JURY FOREMAN: No.

COURT OFFICER: D, Gino Gaspari and Sons, Inc., yes, or no?

JURY FOREMAN: No.

COURT OFFICER: E, Giorgi Mushroom Company, yes, or no?

JURY FOREMAN: No.

COURT OFFICER: F, Kaolin Mushroom Farms, Inc., yes, or no?

JURY FOREMAN: No.

COURT OFFICER: G, Leone Pizzini and Sons, Inc., yes, or no?

JURY FOREMAN: No.
COURT OFFICER: H, Louis M. Marson, Jr., Inc., yes, or no?
JURY FOREMAN: No.
COURT OFFIER: I, Modern Mushroom Farms, Inc., yes, or no?
JURY FOREMAN: No.
COURT OFFICER: J, Monterey Mushrooms, Inc., yes, or no?
JURY FOREMAN: No.
COURT OFFICER: K, Oakshire Mushroom Farms, Inc., yes, or no?
JURY FOREMAN: No.
COURT OFFICER: L, Phillips Mushroom Farms, Inc., yes, or no?
JURY FOREMAN: No.
COURT OFFICER: M, South Mill Mushroom Sales, Inc., yes, or no?
JURY FOREMAN: No.
COURT OFFICER: N, The Eastern Mushroom Marketing Cooperative, Inc., yes, or no?
JURY FOREMAN: Yes.
COURT OFFICER: O, To-Jo Fresh Mushrooms, Inc., yes, or no?
JURY FOREMAN: No.

COURT OFFICER: P, United Mushroom Farm Cooperative, Inc., yes, or no?

JURY FOREMAN: No.

COURT OFFICER: Question three, do you find by a preponderance of the evidence that Defendant, Oakshire Mushroom Farms, Inc., and Oakshire Mushroom Sales, LLC satisfy the ownership and control exception the Court explained, yes, or no?

JURY FOREMAN: Yes.

COURT OFFICER: Question four, do you find by a preponderance of the evidence that the single overarching conspiracy was anticompetitive, such that it caused the price of fresh agaricus mushrooms to be higher than it would have otherwise been, yes, or no?

JURY FOREMAN: No.

COURT OFFICER: Thank you, ladies and gentlemen.

THE COURT: All right. Ladies and gentlemen of the jury, I want to thank you for your attention, your time, and concentration on what was going on here. And you're excused from jury service with the thanks of the Court. And as you go out to the jury room, I'm going to be coming after, because I know you probably have questions of me, and I'm happy to answer them. All right, thank you very much. You're excused.

JURY FOREMAN: Thank you.

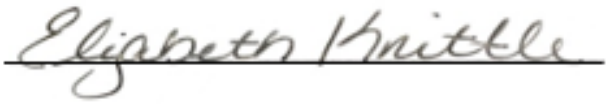
UNKNOWN SPEAKER: Thank you.

(Jury out at 2:45 p.m.)

(Court adjourned.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



Elizabeth Knittle

March 16, 2022

Elizabeth Knittle

Date

WORD INDEX